Claim No. SCT 145/2016

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

In the name of His Highness Sheikh Mohammed Bin Rashid Al Maktoum,

Ruler of Dubai

IN THE SMALL CLAIMS TRIBUNAL

BEFORE SCT JUDGE AYESHA BIN KALBAN

BETWEEN

HALSEY

Claimant

and

HALINA DIFC LIMITED

Defendant

Hearing: **16 January 2017**

Judgment: **25 January 2017**

JUDGMENT OF SCT JUDGE AYESHA BIN KALBAN

UPON the Claim Form being filed on 1 September 2016

AND UPON the parties being called on 19 September 2016 for a Consultation with SCT Officer Mahika Hart and the parties not having reached settlement;

AND UPON the Counterclaim being filed on 26 September 2016

AND UPON the parties being called on 11 October 2016 for a Second Consultation with SCT Officer Mahika Hart and the parties not having reached settlement

AND UPON a Hearing having been held before SCT Judge Ayesha Bin Kalban on 16 January 2017, with the Claimant and the Defendant's representative in attendance

AND UPON reviewing the documents and evidence submitted in the Court file;

IT IS HEREBY ORDERED THAT:

1. The Defendant shall pay the Claimant a final settlement of AED 36,400 owed by the Defendant for unpaid salary.

2. The Defendant shall pay the Claimant AED 29,400 in lieu of accrued vacation days.

3. The Defendant shall reimburse the Claimant's Court fee in the amount of AED 4,672.54.

4. The Defendant shall pay the Claimant AED 181,999.35 as a penalty pursuant to Article 18(2) of DIFC Employment Law and an additional AED 933.33 per day from the date of this Judgment, until payment is made.

5. The Counterclaim is dismissed in full.

Issued by:

Ayesha Bin Kalban

SCT Judge

Date of issue: 25 January 2017

At: 4pm

THE REASONS

Parties

6. The Claimant is Halsey (the "Claimant"), an individual filing a claim against the Defendant regarding his employment.

7. The Defendant is Halina DIFC Limited (the "Defendant"), a DIFC registered company.

Background

8. The underlying dispute arises over the employment of the Claimant by the Defendant in the position of "Senior Manager- Investment Advisory" pursuant to an employment contract dated 5 August 2015 (the "Employment Contract").

9. On 1 September 2016, the Claimant filed a claim in the DIFC Courts' Small Claims Tribunal (the "SCT") for payment of unpaid salary, accrued vacation days and the penalty owed pursuant to Article 18(2) of the DIFC Employment Law.

10. The Defendant responded to the claim on 8 September 2016 indicating its intention to defend the claim in full.

11. The parties met for a Consultation with SCT Officer Mahika Hart on 18 September 2016 but were unable to reach a settlement.

12. On 26 September 2016, the Defendant filed a Counterclaim seeking from the Claimant payment of USD 61,205.55 being the sum owed by the Defendant as a result of the judgment issued on 29 August 2016, in a separate claim filed in the SCT, under the case no. SCT-081-2016.

13. The parties met for a Second Consultation with SCT Officer Mahika Hart on 11 October 2016 but were unable to reach a settlement.

14. On 26 October 2016, the Defendant requested via email permission to be represented by a lawyer at the Hearing. Although the Claimant objected to permission being granted, SCT Judge Mariam Deen issued an Order dated 6 November 2016 allowing the Defendant and the Claimant to have legal representation in the Hearing and allowing the Claimant additional time to obtain a pro-bono lawyer. The Claimant, understanding that he was allowed to seek pro-bono representation, decided to continue without legal representation. The Defendant had legal representation at the Hearing.

The Claim

15. The Claimant's case is that he was employed by the Defendant from 18 August 2015 onwards and resigned on 31 March 2016, with his last working day being 1 July 2016.

16. The Claimant submitted that his reason for resignation was due to the Defendant's delay in the payment of his salary for the months of January and February, which were paid to him on 22 February 2016 and 24 April 2016 respectively.

17. The Claimant seeks the payment of his salary for the month of June, the payment of his salary for 8 days in the month of May, and the payment of his salary for 1 day in the month of July. He also claims for his unused vacation days and for penalty as per Article 18(2) of the DIFC Employment Law.

18. The Defendant does not contest the substance or content of the Claimant's claims in its written or oral submissions. Instead, the Defendant requests that these employment claims be dismissed for the reasons set out below in the Defence and Counterclaim.

The Defence and Counterclaim

19. In its written submissions and at the Hearing, the Defendant confirmed that it employed the Claimant, stating that this is not a fact in dispute between the parties.

20. The Defendant alleges that the Claimant committed a breach of Article 4.3 of his Employment Contract which reads as follows:

> "4.3. Conduct & Behaviour: In performing your Employment obligations, You shall:
>
> .
>
> refrain from any act or activity that could pose a risk to the financial condition, assets or reputation of the Company..."

21. The Defendant alleged that the Claimant committed this breach in his dealings with a client, Third Party "), which was the subject of the claim SCT-081-2016, adjudicated in this Court by SCT Judge Natasha Bakirci in her judgment dated 29 August 2016.

22. In its written and oral submissions, the Defendant sets out the chain of events relevant to its Counterclaim, namely the manner in which the Claimant conducted himself in his professional dealings with Third party. The Defendant states that the Claimant solicited Third Party to purchase a structured investment product under the title "Multi Barrier Reverse Convertible on Facebook, Linkedin and Twitter" (the "Product"), with the position to be held for 6 months.

23. The Defendant describes the Product as follows:

> "As an investment the product features paying out a monthly coupon based on a 12.5% annual rate on a derivative instrument based on the prices of three underlying securities, namely Facebook, Linkedin and Twitter. The European Barrier is set as 60% of the initial price fixed in the product. If no barrier event occurs, the investor will receive the principal amount back at the end of the 6 months tenure. If the barrier event occurs, the investor will receive an amount calculate based on the prices of the worst performing underlying security on the redemption date." [sic]

24. The Defendant continues that, on the Claimant's advice, Third Party agreed to invest USD $ 80,000 in the Product, pursuant to which the Claimant sent an email to Third Party attaching a subscription form reflecting information on the Product, which, in turn, was signed and sent back to the Claimant on 14 December 2015. On 18 December 2015, the Claimant sent an email to Third Party, referencing a telephonic conversation that had occurred between them, and requesting confirmation from Third Party on the details which he then set out, namely being that the Product

would be traded on 18 December 2015. Third Party responded by providing a confirmation of his agreement for the trade to proceed on that date, and thanking the Claimant for his efforts.

25. The Defendant alleges that the Claimant then followed the Defendant's internal command structure in order to execute the trade, and obtained the approval of the Defendant's CEO, but made a subsequent error in execution of the trade such that the Product was purchased in a form different than Third Party had approved.

26. On 21 December 2015, the Claimant proceeded to forward the trade confirmation to Third Party, who noticed a discrepancy between the date on which he had approved for the Product to be structured, and the date on which the Product was actually structured. Third Partyobjected because of this variance in date, and demanded a refund of his investment in the amount of USD $ 80,000.

27. The matter was then escalated to the senior management of the Defendant company, who tried to rectify the situation, and Third Party was offered a solution which could potentially correct the error. This involved the reinstatement of the investment position to 18 December 2015, which was the date which Third Party and the Claimant had originally agreed on. This was to be done at the Defendant's cost, and the Claimant accepted to bear the amount of USD $ 1,600, which would be, in the Defendant's submission, half the cost of the reinstatement. This option to restructure was refused by Third Party, who repeatedly demanded the return of his investment amount.

28. On 14 June 2016, Third Party filed a claim against the Defendant with the SCT, seeking the full reimbursement of his investment. The SCT Judge Natasha Bakirci found in favour of Third Party , and ordered the payment of AED 211,710.14 as restitution of the claim to be paid by the Defendant to Third Party , in addition to the payment AED 13,220.26 as a reimbursement of the DIFC Courts' fee.

29. The Defendant alleges that, in agreeing to pay the reinstatement cost out of his salary, as evidenced in correspondence between the parties, the Claimant has admitted to a breach of his duties as listed in clause 4.3 of the Employment Contract. Therefore, the Defendant decided to withhold the payment of his salary pursuant to clause 5.8 of the Employment Contract, which reads as follows:

> "5.8. Breach of Terms & Conditions: In the event of You breaching any of the terms and conditions outlined in this Agreement the Company shall be entitled to immediately cease any payment of Your compensation or any part thereof and shall exercise its right to claim losses and damages arising as a result of or in connection with any such breach." [sic]

30. The Defendant further alleges that clauses 4.3 and 4.8 of the Employment Contract, in conjunction with Articles 109, 110 and 111 of the DIFC Law No. 6 of 2004 (the "DIFC Contract Law"), require that the Claimant be held liable for the judgment amount which was paid by the Defendant to Third Party. The Defendant therefore seeks the payment of USD $ 61,205.55 by the Claimant to the Defendant, and the payment of the DIFC Courts' fee for the Counterclaim, amounting to USD $ 1,224. The Defendant seeks the dismissal of all of the Claimant's employment claims, due to his alleged breach of contract.

Discussion

31. This dispute is governed by DIFC Law No. 4 of 2005, as amended by DIFC Law No. 3 of 2012 (the "DIFC Employment Law") in conjunction with the Employment Contract.

The Claim

32. The Claimant has met his burden of proof in proving that he was an employee of the Defendant company until his last working day of 1 July 2016. The Defendant does not contest this.

33. The Claimant claims his unpaid salary for the month of June, 8 days' salary for the month of May, 1 day salary for the month of July, and payment in lieu of accrued vacation days. The Claimant has not put forward any proof that he was not paid for this time, however the Defendant has not denied or presented any evidence to negate these claims. It is the Defendant's obligation to retain a record of the Claimant's wages and vacation leave, pursuant to Article 16 of the DIFC Employment Law, and the Defendant has not presented any such records. I therefore interpret this to mean that the Defendant does not contest the value of the Claimant's claim.

34. As the Claimant has proven he was an employee of the Defendant, he is entitled to receive his salary for all days worked and to receive a pay out of his remaining vacation days upon his resignation. Therefore, the Claimant is owed his unpaid salary for the month of June (AED 28,000), his dues for 8 days worked during the month of May (28,000/30 = AED 933.33) (933.33 x 8 = AED 7,464.64), 1 day worked during the month of July (933.33 x 1 = AED 933.33), and payment in lieu of accrued vacation days amounting to AED 29,400. The Defendant is also to reimburse the Claimant for the Court fee, amounting to AED 4,672.54, as the Claimant had no option but to bring a case in order to receive his dues. Therefore, the total sum owed to the Claimant is AED 70,470.51.

35. I find that the Defendant has not put forward any submissions to contest the content of the Claimant's claims, save to say they should be dismissed due to the Claimant's admitted breach of the Employment Contract, for the reasons set out in the Defendant's Counterclaim. In its submissions, the Defendant states that, in withholding the payment of the Claimant's salary, it was exercising its right to do so, pursuant to the aforementioned clause 5.8 of the Employment Contract. However, as found below, the Defendant's Counterclaim is found to be without merit, and therefore this attempted defence becomes irrelevant.

Article 18 of the DIFC Employment Law

36. In his written and oral submissions, the Claimant confirmed that he sought the penalty due under Article 18 of DIFC Employment Law to be activated. It provides:

> "(1) An employer shall pay all wages and any other amount owing to an employee within fourteen (14) days after the employer or employee terminates the employment.

(2) If an employer fails to pay wages or any other amount owing to an employee in accordance with Article 18(1), the employer shall pay the employee a penalty equivalent to the last daily wage for each day the employer is in arrears."

37. The Defendant has not shown any attempts to pay the Claimant what he was owed within 14 days of his resignation, and has withheld the payment of his dues under the presumption that it was in its rights to do so under clause 5.8 of the Employment Contract.

38. Although not specifically argued, the Defendant's claim that it was entitled to withhold payment from the Claimant amounts to an attempted defence on the Claimant's Article 18 claim, such that the Defendant was allegedly not in arrears, due to it exercising its right under the Employment Contract to withhold and cease payment. This argument, if brought, would not be successful for the following reasons:

a. The DIFC Employment Law does not provide a mechanism by which an employer may refrain from paying an employee his wages. Therefore, any agreed provision between the parties to this effect is invalid, as it is not one permitted by the DIFC Employment Law (see paragraph 43 below).

b. If such withholding were to be permitted, the employer would be required to bring a claim for the amount allegedly owed by the employee in a timely fashion. In this case, the Defendant did not bring such a claim until 26 September 2016, and only after the Claimant had filed his claim. There was nothing preventing the Defendant from filing a claim and then seeking a stay of proceedings pending the outcome of the ongoing litigation between the Defendant and Third Party.

c. If the Defendant did in fact bring its claim against the Claimant in a timely fashion, and its Counterclaim was successful, it is unclear whether this would have prevented the trigger of the Article 18 penalty. It is not necessary to make a determination on this matter, as the Counterclaim was not successful and the Defendant did not bring its claim against the Claimant in a timely fashion.

39. Therefore, the Defendant's unpleaded but implied defence to the application of Article 18 to the circumstances at hand is rejected. In accordance with the DIFC Courts precedent set by the judgment of Justice Roger Giles in *Asif Hakim Adil v Frontline Development Partners Limited* [2014] DIFC CFI 015 and the judgment of H.E. Justice Ali Al Madhani in *Pierre-Eric Daniel Bernard Lys v Elesco Limited* [2014] DIFC CFI 012, the Claimant is entitled to Article 18 penalties running from 14 days after his official date of resignation until the date payment is made. Accordingly, the Defendant has been in arrears since 15 July 2016 (14 days following the Claimant's last working day on 1 July 2016) and the penalty began to accrue at the daily rate of AED 933.33 from this date.

40. As of the date of this Judgment, the penalty is owed for 195 days from 15 July 2016 until 25 January 2017, totaling AED 181,999.35 (195 x 933.33), with the daily penalty of AED 933.33 continuing to accrue until the date of payment.

The Counterclaim

41. The Defendant seeks from the Claimant the sum of USD $ 61,205.55, as damages arising out of the judgment of SCT Judge Natasha Bakirci in the case SCT-081-2016, or the application of a set-off in the event that the Court finds that the Claimant is entitled to any of his claims, such as that the Claimant will pay to the Defendant the difference in value. The Defendant also seeks an order for the Claimant to pay the Court fee applicable to the filing of the counterclaim.

42. The Defendant relies on clause 5.8 of the Employment Contract, which purports to allow the Defendant to withhold or cease payment of the Claimant's wages in the event of a breach of the Employment Contract. The Defendant alleges that, as the Claimant has admitted to the breach of his duties, he should be liable to pay the judgment sum.

43. I find that clause 5.8 of the Employment Contract is not a permissible provision under the DIFC Employment Law. While the DIFC Employment Law does allow employers to claim against their employees in certain circumstances, it does not envision or provide a mechanism for the employer to withhold or cease to make a payment of the employee's dues under any circumstance. As detailed in Article 10 of the DIFC Employment Law, the DIFC Employment Law sets out the minimum requirements for the regulation of an employment relationship, and a provision that does not meet these minimum requirements is considered to be without effect, unless expressly permitted under the Law. To clarify further, any contract provision that is less favourable to an employee than what is set out in the Employment Law is deemed invalid unless the Employment Law explicitly allows such a provision.

44. Furthermore, the DIFC Employment Law contains specific provision, namely Article 51, regarding when an employee may be found liable for his own acts in the course of employment and such provision was not addressed in the Defendant's written submission. Instead, the Defendant relied upon Articles 109, 110 and 111 of the DIFC Contract Law, stating that the Claimant allegedly breached his Employment Contract and should be liable for the harm caused by that breach. While the DIFC Contract Law may be applied to employment contracts, it is superseded by the more specific requirements of the DIFC Employment Law, meant to govern contracts of employment in the DIFC. As the DIFC Employment Law has a provision relevant to circumstances where an employee can be found liable for his own acts committed in the course of his employment, this provision must be applied rather than the DIFC Contract Law.

45. In the Hearing, the Defendant's representative was asked to provide oral submissions regarding Article 51 of the DIFC Employment Law, which reads as follows:

"51. Liability of employers for employee's conduct:

(1) Subject to Article 51(2), an employer is liable for any act of an employee done in the course of employment.

(2) An employer is not liable for an act of an employee if the employer proves that it took reasonable steps to prevent the employee from doing that act or from doing, in the course of employment, acts of that description."

46. The Defendant's representative submitted that the Defendant company has put in place internal policies and compliance procedures for employees to follow, such as an operating manual and a policy of only hiring DFSA-approved employees. It is in the Defendant's view that the

Claimant acted completely of his own accord and thus outside "the course of [his] employment", and the procedures put in place by the Defendant are sufficient to prevent this type of employee error. The Defendant's representative further submitted that upon becoming aware of the situation with Third Party, the Defendant's higher management did everything in their power to attempt to rectify the matter, which ultimately did not bode any success.

47. The Defendant has not put forward any submissions on what steps it has taken to prevent the Claimant from committing this type of error, classified by the Claimant as a miscommunication between himself and the trader, the person executing trades on the Defendant company's behalf. Article 51 envisages that an employer must prove that it has taken reasonable steps to prevent an employee from committing an act, and that the employee must have, in committing such an act, acted in spite of these reasonable preventative steps. I find that this is not the case in this matter.

48. The Claimant has submitted evidence to show that the trade of the Product was done in accordance with the internal command structure, and that he obtained the approval of the Defendant's CEO prior to the trade. Should the Defendant company have had stricter procedures, the error may have been noticed at an earlier stage and thus, may have been prevented. Some amount of non-malicious human error is to be expected in any field and the DIFC Employment Law does not envision that employees will be liable for those types of errors unless the requirements of Article 51 have been met.

49. The Claimant was asked to provide proof of his submission of the trade for approval, pursuant to the internal command structure, as a post-hearing submission. This was provided by the Claimant on 18 January 2017, to which the Defendant had the opportunity to respond, and did so on 19 January 2017. The documentation submitted by the Claimant shows clear approval of the transaction by the CEO of the Defendant company. It is not clear from the documents where the miscommunication or error occurred, as the Claimant sent the trade information, including the correct date of 18 December 2015, to the Defendant company's trader on 18 December 2015 at 2:59pm. The Defendant company's CEO was in copy.

50. The Defendant objects saying that this approval included the correct information of 18 December 2015 and thus there was no opportunity for the CEO to catch the error that later occurred in the purchase of the Product. It is not clear from the submissions from either party where the actual change from 18 December 2015 to 9 December 2015 occurred in the process. This fact alone indicates that the Defendant does not have in place adequate procedures to prevent this type of error from occurring.

51. While the Claimant has admitted in his oral and written submissions that the error occurred as a result of a miscommunication between himself and the trader, and did offer, as a gesture, to bear the cost of a remedy in the amount of USD $ 1,600, I am not of the view that the Claimant's conduct was outside the scope of his employment, or that he committed an intentional or negligent breach of his duties. I am also not of the view that the Defendant's set of internal procedures and mandates are enough to prevent this type of employee error or that the Claimant did not follow the procedures that were in place.

52. The Defendant has also not put forward any evidence to suggest that the Claimant acted of his own accord, or acted outside of the company's procedures. Thus, the Defendant has not proven its Counterclaim and Article 51 remains applicable to this matter. The Defendant company therefore remains liable for loss incurred as a result of the error allegedly committed by the Claimant and the Counterclaim is dismissed in full.

Conclusion

53. In light of the aforementioned, I find that the Defendant is liable to pay the Claimant for unpaid salaries for the months of May, June and July, for untaken vacation days, and a penalty for every day that it has been in arrears, pursuant to Article 18 of DIFC Employment Law. Furthermore, the Defendant is liable to reimburse the Claimant for the Court Fee. The Defendant's Counterclaim is dismissed in full.

Issued by:

Ayesha Bin Kalban

SCT Judge

Date of issue: 25 January 2016

At: 4pm